

**Department of Family and Community Services, Community Services  
Submission to the Department of Attorney General and Justice**

**Review of the *Young Offenders Act 1997*  
and the *Children (Criminal Proceedings) Act 1987***

**Introduction**

Department of Family and Community Services, Community Services Division ('Community Services') supports the review of the *Young Offenders Act 1997* (the YOA) and the *Children (Criminal Proceedings) Act 1987* (CCPA) that the Department of Attorney General and Justice is currently undertaking. Community Services agrees that it is important to ensure that these two pieces of legislation continue to reflect best practice and meet the needs of children and young people and the community, including victims.

The Department of Family and Community Services delivers services to some of the most disadvantaged individuals, families and communities in NSW, including Aboriginal and Torres Strait Islander people, children and young people, families, people who are homeless, people with a disability and their families and carers, women and older people.

The Department's work aims to:

- enable each child in NSW to have the best possible start to life
- help vulnerable young people build their capacity for a good future
- improve social and economic outcomes for Aboriginal people
- provide support to vulnerable adults and families so that they can participate fully in community life and
- build strong and inclusive communities.

Community Services is the leading community service agency in NSW and the largest child protection agency in Australia. The agency works in cooperation with other government and community groups to help build a safer and stronger community for everyone. The core role of Community Services is to ensure that children and young people receive a good start in life by providing a range of services and support to them and their families. In addition to taking appropriate child protection measures, the agency provides other services such as prevention and early intervention programs; arranges for appropriate care for children and young people who cannot live safely at home and funds and supports organisations providing out of home care. Community Services also offers a number of services designed to encourage community development and address issues that lead to family breakdown.

Of particular concern to Community Services is the impact of the YOA and the CCPA on children and young people, and their families, particularly children and young people who are living in out-of-home care (OOHC) who have entered the juvenile justice system. Community Services is supportive of measures that can be adopted to address the causes of juvenile offending and juvenile recidivism.

Legislative amendment to the current legislation alone will be insufficient to address underlying causes of juvenile offending and juvenile recidivism. Community Services

acknowledges that a whole of government approach is required, particularly in relation to supporting programs and sharing information. Approaches which support and expand community based responses have proven to reduce juvenile offending and divert youth from the juvenile justice system, such as youth justice conferencing.

## Questions for Discussion

A detailed discussion of the questions raised in the Consultation Paper which are of relevance to Community Services is set out below.

### Question 1:

- (a) Does NSW's legislative framework take the right approach to offending by children and young people?**  
**(b) Are there any other models or approaches taken by other jurisdictions that this review should specifically consider?**

### Legislative framework in NSW

Community Services is of the view that the current legislative framework does not allow for a holistic and consistent approach to juvenile justice in NSW.

There are currently numerous Acts (and associated statutory rules) that are applicable to offending by children and young people:

- CCPA
- YOA
- *Bail Act 1978*
- *Crimes Act 1900*
- *Criminal Procedure Act 1986*
- *Crimes (Forensic Procedures) Act 2000*
- *Children (Protection and Parental Responsibility) Act 1997*
- *Children (Detention Centres) Act 1987*
- *Children (Community Service Orders) Act 1987*
- *Crimes (Domestic and Personal Violence) Act 2007*
- *Road Transport (Drivers Licensing) Act 1998*
- *Road Transport (Vehicle Registration) Act 1997*
- *Law Enforcement (Powers and Responsibilities) Act 2002*
- *Children (Interstate Transfer of Offenders) Act 1988*
- *Crimes (Administration of Sentences) Act 1999*

Community Services supports an integration of legislation applicable to offending by children and young people.

Community Services, in particular, supports an integration of the CCPA and the YOA. Amending and integrating both Acts to create a single piece of legislation will hopefully ensure that both substantive and procedural law relating to young offenders remains consistent, just and reflects community standards. An integration of these two Acts is an important chance to consolidate and clarify the main principles of juvenile justice in NSW.

As NSW provides a hybrid approach of welfare and restorative justice, there does appear to be a balance, and it is important that this balance is maintained. The juvenile justice

system needs to remain focused on the children who offend but must not lose sight of the victim of crime or the impact that crime has on the community.

Community Services, in general, supports a legislative framework that:

- Prioritises diversion from the juvenile justice system, and emphasises that detention is a measure of last resort
- Addresses the causes of juvenile offending and aims to reduce the incidence of juvenile offending
- Places more emphasis on restorative justice and community based sentencing options
- Encourages genuine participation from children and young people
- Causes young offenders to be accountable to their families, the community and victims, and empowers families and victims in the process
- Engages the family, the community, and non-government agencies and adopts a whole of government approach in addressing juvenile offending
- Aims to reduce the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system
- Takes into account the special needs of children and young people in OOHC
- Takes into account the special needs of children and young people with cognitive impairment or mental health issues

#### Other approaches in other jurisdictions

Community Services notes that the following could be taken into account from other jurisdictions to evaluate the effectiveness of implementing similar models or approaches in NSW:

- The broader extent of Family Group Conferencing in New Zealand (the 'lynchpin' of the juvenile justice system in New Zealand) as established by the *Children, Young Persons and Their Families Act 1989* (NZ).
- The Koori Youth Justice Program in Victoria which provides support through local Aboriginal agencies using preventative and responsive measures to reduce offending and reoffending by Aboriginal youth on community based orders and in custody.
- Victoria's Children's Koori Court. In contrast to the mainstream system, the Koori Court provides a less formal atmosphere that allows greater participation by the Aboriginal (Koori) community in the court process. The magistrate sits at a table with the participants at the court hearing, not at the bench, and discusses the matter in plain English, not in technical legal language. Koori Court Elders and/or Respected Persons, a Koori Court Officer, the defendant, and their family can all contribute to the discussions during the court hearing.
- Queensland's Youth Murri Court. The Murri Court is a Magistrates Court or a Children's Court constituted by a Magistrate which is designed specifically for Aboriginal and Torres Strait Islander offenders. The Murri Court involves Indigenous Elders or respected persons in the court process.
- Circle sentencing and Care circles (care circles are running as pilots in the care jurisdiction in NSW) allow for greater involvement and community support for children of Aboriginal and Torres Strait Islander background.
- The Government of South Australia runs a Community Mentoring Program which links role models drawn from members of the community, with those students most at risk of leaving school early. This type of program might be beneficial for application in the juvenile justice system. Research has found that young people who are mentored are less likely to leave school early, engage in criminal activity or experiment with substance abuse.

Community Services notes that the Northern Territory Government has recently undertaken a review of its youth justice system<sup>1</sup>. The Department notes that the recommendations in relation to data collection and information sharing, investing in diversion, and establishing external monitoring and evaluation processes are relevant and of assistance to the current review.

Community Services notes that the Consultation Paper at page 10 referred to countries, such as Sweden and Scotland, that have a more 'welfare based' approach, which highlights the needs and best interests of the child offender rather than the offence, and where social services and the judicial system share responsibility for the children committing offences. Currently a child or young person offending per se does not meet the statutory threshold of risk of significant harm<sup>2</sup> to warrant Community Services intervention. If this 'welfare based' approach was to be considered, the potential need for additional Community Services staffing, capacity, and change of guidelines, would also need to be taken into account.

## **Young offenders Act 1997**

### **Questions 2:**

- (a) Are the objects of the YOA valid?**
- (b) Are any additions or changes to the objects of the YOA needed?**
- (c) Should reducing re-offending by an objective of the YOA?**

As the scheme of warnings, cautions, and youth justice conferences, are well-established, the objects of the YOA needs to be amended to promote the continued use of such, rather than establishment. The scheme that is currently in place, and which is prescribed by the YOA, is 'hierarchical'. Community Services proposes that the scheme be described as 'hierarchical' in the objects of the YOA.

### Diversion

The current objects of the YOA are valid, however Community Services recommends that consideration should be given to strengthening the first object of establishing a scheme that provides an alternative process to court proceedings (through the use of warnings, cautions and youth justice conferences). That is, rather than just being one option or an alternative, the scheme under the YOA of warnings, cautions and conferences, should be pursued instead of criminal proceedings, unless the Act otherwise provides. Section 7(c) provides that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter. This principle is, to some extent, vague. The YOA (or in the instance that the YOA and CCPA are integrated – that Act) should be explicit in terms of the preference for diversion under the tiered scheme in the YOA, unless the legislation provides that criminal proceedings should be pursued.

### Victims

Community Services is of the view that greater emphasis could be placed on the object of addressing the needs of victims. Currently section 3(c)(iii) of the YOA provides that youth justice conferences will be established to deal with alleged offenders in a way that 'meets

<sup>1</sup>Review of the Northern Territory Youth Justice System: Report, September 2011:

<[http://www.safeterritory.nt.gov.au/youth\\_justice\\_review/Youth%20Justice%20Review%20Report.pdf](http://www.safeterritory.nt.gov.au/youth_justice_review/Youth%20Justice%20Review%20Report.pdf)>

<sup>2</sup>Children and Young Persons (Care and Protection) Act 1998 (NSW), s 23.

the needs of the victims and offender'. There should be a separate object of the Act in relation to victims, and the object should be more specific. That is, there could be reference to encouraging the participation of, and having regard to the views, interests and rights of victims.

### Role of families, kinship groups and persons responsible for children

Community Services is of the view that reference could be made in the objects of the Act to strengthening the capacity of families, kinship groups and persons responsible for young offenders to deal with offending by the child or young person. In this regard, Article 3(2) of the United Nations *Convention on the Rights of the Child* (CROC) provides that States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. Article 5 of CROC also provides that States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in CROC.

### Aboriginal and Torres Strait Islander children

The Australian Law Reform Commission (ALRC) recommended in 1997 that the national standards for juvenile justice should require governments to ensure Indigenous communities are able to develop their own family group conferencing models, and that existing conferencing schemes should be modified to be culturally appropriate.<sup>3</sup> The ALRC noted, as at 1997 that despite increased focus in recent years on the chronic overrepresentation of Indigenous children at all stages of the juvenile justice system, they were still not being diverted from the juvenile justice system at the same rate as non-Indigenous offenders. Moreover, the ALRC was of the view that current Australian models 'fail to understand the complex reality of Indigenous communities and ignore fundamentally the principle of self-determination', and that the level of police involvement in most conferencing models is particularly problematic for Indigenous communities.

Rather than 'address' the overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system as section 3(d) provides, this object of the Act may be more directive by aiming to actually 'reduce' such overrepresentation. The statistics and information in the Consultation Paper highlights the fact that Aboriginal and Torres Strait Islander children are more likely to be referred to Court than diverted under the YOA. The current objects and principles of the YOA are therefore still not being applied equally to Aboriginal and Torres Strait Islander children. Thus, it may be necessary to strengthen or expand this object of the YOA. Community Services proposes that an object of the YOA be to reduce overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system through the fair and appropriate use of alternative processes. Community Services would also support a separate object which provides that the YOA ensures that children and young persons who have committed offences are treated fairly across NSW.

Community Services also recommends the adoption of certain principles of the *Children (and Young Persons) Care and Protection Act 1998* (the 1998 Act) as noted under Q3.

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<sup>3</sup> Recommendation 201, *Seen and heard: priority for children in the legal process* (ALRC Report 84, 1997).

### Pre-court diversionary therapy program for sexual offending

Community Services proposes that consideration be given to adopting a pre-court diversionary therapy program for sexual offending behaviour, for first sexual offending criminal offences. At a minimum, Community Services proposes that this option should be considered for those whose sexualised behaviour is against a person with whom they have a domestic relationship, such as a sibling, step-sibling, other children living in an out-of-home care placement, or person in a shared care household.

Community Services notes that NSW Health runs the NSW Pre-Trial Diversion of Offenders Program (child sexual assault) for adults. The Pre-Trial Diversion Program is an innovative treatment program for the protection of children. It began operation in 1989 allows for certain categories of child sexual assault offenders to be diverted from the criminal justice process into a two year Treatment Program. The diversion occurs after charges have been filed but before the matter proceeds to conviction or entry of judgement. A conviction is recorded after the offender has been assessed suitable and enters an Undertaking at the District Court to participate. The Treatment Program is open to a limited number of child sexual assault offenders and has specific criteria for eligibility.

During the two years, the offender is bound by the conditions of the Treatment Program. If the offender breaches these conditions, the offender will be returned to the criminal justice system for sentencing. If the offender completes the program successfully no further action will be taken.

Pre-Trial Diversion is an alternative form of prosecution which attempts to increase the effectiveness of the criminal justice system. Its goals are the protection of children and the prevention of further child sexual assault in families where this has occurred. The specific objectives of the Treatment Program are:

- To help child victims and their families resolve the emotional and psychological trauma they have suffered;
- To help other members of the offender's family avoid blaming themselves for the offender's actions and to change the power balance within their family so the offender is less able to repeat the sexual assault;
- To stop child sexual assault offenders from repeating their offences.

If this option is not available under the YOA, then Community Services proposes that it be considered for adoption in the CCPA.

### Establishing clear summary of offences for alternative processes

Community Services proposes that an object of the YOA should be to provide for the establishment of a clear summary of offences for which each alternative process is available. Community Services recommends that alternative options have a hierarchical path, which makes future Police Standard Operating Procedures clear as to what offences can lead to what alternative action, and allowing for minimal options as a first response. This hierarchy with clear guidelines should assist in making a fair system which reduces the overrepresentation of Aboriginal and Torres Strait Islander children in custody.

## Recidivism

Recidivism is widely acknowledged to be a key indicator of the effectiveness of juvenile justice interventions. In Australia, the 'mission statements' or 'vision statements' of all state and territory government departments responsible for providing juvenile justice services reflect the importance placed on reducing recidivism.<sup>4</sup> Given the importance placed on reducing recidivism, it would be appropriate to include the object of reducing reoffending by children and young people.

If reducing reoffending is to be an object of the Act, then consideration will also need to be given to including either objects or principles that relate to addressing the causes of offending, prevention of offending and early intervention. The objectives of promoting the education, training and wellbeing of the young offender through diversionary justice programs could also be included. Diversionary measures can only have a limited impact, however, and reducing offending and reoffending have been identified as critical factors to address, particularly in addressing the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system.<sup>5</sup>

### **Question 3:**

- (a) Are the principles of the YOA valid?**
- (b) Are any additions or changes to the principles of the YOA needed?**
- (c) Should reducing re-offending be addressed in the principles of the YOA?**

Community Services supports the current principles of the YOA, however recommends the following:

#### Consistency across principles

There needs to be consistency across principles of the YOA (and the CCPA, if the two Acts are to be combined). That is, there needs to be consistency across:

- general principles of scheme (section 7 of the YOA)
- principles of conferencing (section 34 of YOA)
- guiding principles (section 6 of CCPA – if the two Acts are to be integrated)

The general principles should convey the overriding principles valid to all sections of the YOA.

#### Aboriginal and Torres Strait Islander self-determination and participation

Community Services recommends the adoption of similar principles contained in the 1998 Act, to address the overrepresentation of Aboriginal and Torres Strait Islander children in the juvenile justice system and the unequal application of the YOA as noted in the Consultation Paper:

#### **Section 11 Aboriginal and Torres Strait Islander self-determination**

- (1) It is a principle to be applied in the administration of this Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible.*

<sup>4</sup> Australian Institute of Criminology, *Measuring juvenile recidivism in Australia* (24 May 2011) .

<sup>5</sup> Richards, K., Rosevear, L., Gilbert, R., "Promising interventions for reducing Indigenous juvenile offending, *Indigenous Justice Clearinghouse*, Brief 10, March 2011, 1.

- (2) *To assist in the implementation of the principle in subsection (1), the Minister may negotiate and agree with Aboriginal and Torres Strait Islander people to the implementation of programs and strategies that promote self-determination.*

## **Section 12 *Aboriginal and Torres Strait Islander participation in decision-making***

*Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.*

### Involvement of communities

Section 7(e) of the YOA establishes the principle that, if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.

Community Services questions the application of this principle in terms of whether it applies to any child with a culturally and linguistically diverse (CALD) background, or to a child with an Aboriginal and Torres Strait Islander background. The application of this principle should be clarified, otherwise it could be open for interpretation. For example, this principle could be used to justify a community taking their own action and using corporal punishment to 'punish' a child in their own community.

Community Services proposes a broader principle be adopted to take into account a child's current circumstances and background such as the current section 34(1)(c) of the YOA (and noting that some of these matters are dealt with below).

### Age/immaturity as a mitigating factor

Section 7(a) should include a reference to age or immaturity as a mitigating factor in consideration of the least restrictive form of sanction. Some codification of the case law on this point would clarify and lead to consistency in decisions as to sanctions for young offenders.

### Child's right to legal representation

Section 7(b) refers to a child's entitlement to be informed about their right to 'legal advice'. This should be broadened to 'legal advice and representation'. Article 40(2)(ii) of CROC provides that in circumstances where it is alleged that a child has infringed penal law, a child is to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence. Article 37(d) of CROC also provides that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Section 7(b) should specify the timing of informing the child of his or her rights to legal advice and representation. That is, the child or young person should be entitled to be



informed about their right to legal advice and representation at the time of Police contact, and certainly before a police interview or the first Court appearance.

### Capacity of parents

Section 7(f) of the YOA provides that parents are to be recognised and included in justice processes involving children and parents are to be recognised as being primarily responsible for the child development. This principle should recognise persons that provide primary care for children who are not parents. Community Services recommends that this principle should be expanded to provide that the capacity of parents and other primary care-givers to deal with offending by their children should be encouraged.

### Victims

Section 7(g) of the YOA provides that victims are entitled to receive information about their potential involvement in, and the progress of, action taken under the YOA.

More, however, could be included in the principles of the YOA to reflect the provisions of the Charter of Victims Rights. Reference should be made to considering the interests and views of victims and the impact of offending on victims in processes under the YOA. The entitlement of a victim to be treated with courtesy, compassion, cultural sensitivity and respect for the victim's rights and dignity should also be included as a principle of the YOA.

### Accountability

There is currently no specific provision in section 7 of the YOA providing for children and young persons to be encouraged to accept responsibility for their behaviour. Section 34(1)(a)(i) of the YOA does provide for the principle of promotion of acceptance by the child concerned of responsibility for his or her own behaviour in the specific context of youth justice conferences. Given that accountability (and the restorative model of juvenile justice) by children of their behaviour is a major theme of the YOA, and is integral to diverting young offenders from the formal court process, it would be beneficial to have the principle of encouraging accountability of young offenders as a general principle of the Act.

### Prior criminal history/prior actions

There is currently no reference in the principles of the YOA in relation to when and under what circumstances a child or young person's prior criminal history or any alternate actions considered or previously attempted is taken into account. At law, it is incumbent upon judges to make clear the precise manner in which an offender's record has been taken into account.<sup>6</sup>It may assist the persons making decisions under the YOA to have a guiding principle which clarifies the consideration of these issues.

### Recidivism

For the reasons noted above, reducing re-offending should be a principle of the YOA.

## **Question 4: Are the persons covered by the YOA appropriate?**

Community Services is of the view that the persons covered by the YOA are appropriate, noting the YOA was previously amended to bring the definition of 'child' in line with the CCPA.

<sup>6</sup>*R v Walker* [2005] NSWCCA 109.

**Question 5: Should the YOA apply to all offences for which the Children’s Court has jurisdiction, unless specifically excluded?**

Given the reported success of the application of the YOA and the benefits for young offenders and the community in terms of diversionary options for young offenders, Community Services supports a wider application of the YOA to all offences, unless specifically excluded.

Community Services supports a consistent approach between the YOA and CCPA, that is a general exclusion to the application of both Acts of “serious children’s indictable offences” as defined in the CCPA.

Community Services recommends that a schedule of offences which are managed by the YOA be inserted into the YOA.

This would clearly outline which offences meet the criteria for alternative processes. Such a schedule would also be of assistance if the YOA and CCPA were integrated.

As noted above, Community Services is of the view that the YOA (or a the CCPA or an Act which is an integration of both) should have special provisions to provide pre-court diversionary therapy for children who display sexualised behaviour (for first time sexual offending), especially those who undertake such acts against a person with whom they have a domestic relationship. Such a program is in place for adults. This would be consistent with the principles that children have rights and freedoms before the law equal to those enjoyed by adults, and the penalty imposed on a child or young person for an offence is no greater than that imposed on an adult who commits an offence of the same kind.

**Question 6:**

- (a) Is the current list of offences specifically excluded from the YOA appropriate?**
- (b) Is there justification for bringing any of these offences within the scope of the YOA?**

Offences under the *Crimes (Domestic and Personal Violence) Act 2007*

Community Services notes that the *Crimes (Domestic and Personal Violence) Act 2007* (the 2007 Act) is also subject of review by the Department of the Attorney General and Justice.

Community Services acknowledges the reasoning behind excluding offences under the 2007 Act from the coverage of youth justice conferencing, although the reasoning for exclusion from the application of warnings and cautions under the YOA is not as clear.

Community Services however also acknowledges the comments made in relation to Family Dispute Resolution (FDR) in cases involving family violence by the Australian Law Reform Commission and the NSW Law Reform Commission in their joint report entitled: *Family Violence – A National Legal Response* (‘Family Violence Report’).<sup>7</sup>

<sup>7</sup> ALRC Report 114.

Chapter 21 of the Family Violence Report highlighted the reasons why FDR may be inappropriate in the context of family violence:

- safety concerns—the FDR process may place women and children in danger because the offender may use FDR as an opportunity for violence or intimidation;
- power imbalances—the sometimes extreme imbalance of power in relationships characterised by family violence undermines the fairness of the negotiating process in facilitative methods of FDR;
- mediation requires honesty, desire to settle the dispute and some capacity for compromise—perpetrators of violence are not generally capable of such behaviours in relation to the target of their violence;
- mediation places too great a burden on the woman who has been the victim of violence, and who may, for example, be afraid to be in the same room with the perpetrator; and
- FDR is a private and confidential process, with the effect that violence against women is shielded from the public eye<sup>8</sup>

The Family Violence Report also pointed out in the same chapter that the risks associated with family violence in FDR processes may be managed in a number of ways. Some examples include:

- ensuring that victims are prepared for the process;
- taking practical measures to ensure safety, such as obtaining a silent phone number;
- taking care with client contact, for example by making written material only available at the centre and not leaving phone messages;
- minimising contact between clients on the day, by using separate waiting rooms and exits for clients, and staggered arrival and departure times;
- allowing the presence of support persons;
- continuously assessing clients' comfort levels and emotional state;
- using 'shuttle' mediation, where parties sit in different rooms and the mediator 'shuttles' between them;
- co-mediation with a male and a female mediator;
- using multiple short mediation sessions to reduce stress and the impact of contact with the perpetrator; and
- private follow-ups with each party between sessions.

Community Services notes that Dispute Resolution Conferences held in care and protection matters<sup>9</sup>, which involve the attendance of parties to the care proceedings and their legal representatives, and representatives from Community Services, often address the issue of domestic violence and violence in general. Domestic violence is the primary reported issue in 23% of reports received by Community Services and is a common issue in care and protection matters before the Children's Court. The difference in care and protection matters is that parties often dispute the allegations that have been made, and conferences are often held before the Court has made findings in relation to those allegations. In youth justice conferences, it is a precondition that the child offender admits the offence. Therefore the fact of violence is not necessarily mediated.

The presence of family violence should not automatically exclude the use of alternative dispute resolution, or in this case, conferencing. Measures can be adopted to manage any risks, such as providing support persons or advocates for family violence victims or

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<sup>8</sup>At para 21.31.

<sup>9</sup>Pursuant to section 65 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

arranging for perpetrators to participate by letter, conference call or spokesperson. These measures could allow families experiencing family violence to gain some of the benefits of conferencing, such as personal empowerment and mobilisation of a range of supports. Community Services is concerned that the blanket exemption of these offences from the YOA is detrimental to children and young people. It closes the door in terms of not being able to access the alternative processes under the YOA, which means they are more likely to enter the criminal justice system, which evidence has established is more harmful and inconsistent with the principles underpinning the YOA.

Community Services is aware that parents can use Apprehended Violence Order (AVO)s against their children as a form of control, and when those children breach the orders (which is not uncommon particularly if the conditions placed on them are unreasonable), the children are at risk of ending up in a juvenile detention facility on remand as their parents do not want them to return home, and they have nowhere else to be bailed to. While the requirement that AVOs against children (under 18 years) can only be made by a Children's Court ensures that magistrates with expertise in child law determine these applications, this check does not necessarily apply in regional areas where Children's Court matters are dealt with by a Local Court magistrate with little expertise in child law, and the dynamics between parents and kids. Matters of this kind would benefit from the option of conferencing, where the underlying issues in the family can be discussed and possibly resolved without progressing through the court process or having a child or young person in detention.

The YOA already has provisions for decision makers to consider before referring matters to a conference – such as the degree of violence involved in the offence, the harm caused to any victim as well as any other matter thought appropriate in the circumstances.<sup>10</sup> Community Services is of the view that the following screening criteria could be incorporated in either legislation or guidelines:

- Conferencing should not be used where it would compromise the safety, welfare and well-being of the child or any other person who is a party to the conference
- In the event that there are allegations of violence between participants, participants will not be required to attend the conference. Where a conference is attended, those allegations must be addressed to the satisfaction of the participants, and the convener conducting the conference
- Parties have legal capacity and competency to participate

### Traffic offences

The Children's Court does not have the jurisdiction to hear and determine traffic offences alleged to have been committed by a child under the YOA or the CCPA. The exception to section 28(2) of the CCPA is where the traffic offence arose in the same circumstances as another offence being dealt with by the Children's Court, or the child was not of licensable age (16 years). The Consultation Paper indicates that the key justification for this exclusion from the application of the YOA is consistency with the jurisdiction of the Children's Court. Community Services supports the broadening of the Children's Court jurisdiction to be able to determine all traffic offences for children to allow for consistency in sentencing.

The CCPA, in particular, recognises that children and young people are important and different. Section 6(a) of the CCPA provides that children have rights and freedoms before the law equal to those enjoyed by adults. Section 6(b) of the CCPA recognises that children who commit offences should bear responsibility for their actions, but because of their state of dependency and immaturity, require guidance and assistance. It would seem reasonable that all traffic offences be heard in the Children's Court and that the benefits of

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<sup>10</sup>Sections 37(3) and 40(5) of the YOA.

the diversionary scheme under the YOA also be made available to children and young people in this regard. Community Services acknowledges the reasoning for the basis of the current exclusion, in terms of the presumption that a young person old enough to drive is old enough for adult consequences of criminal behaviour when it comes to driving. This, however, does not accord with the principles of the CCPA and does not recognise that children and young people should be treated differently to adults. This exclusion is also not apparent in other jurisdictions.

### Sexual offending

Community Services is of the view that the YOA (or the CCPA or an Act which is an integration of both) should have special provisions to provide pre-court diversionary therapy for children who display sexualised behaviour (for first time sexual offending), especially those who undertake such acts against a person with whom they have a domestic relationship. Such a program is in place for adults. This would be consistent with the principles that children have rights and freedoms before the law equal to those enjoyed by adults, and the penalty imposed on a child or young person for an offence is no greater than that imposed on an adult who commits an offence of the same kind.

**Question 7: Should warnings be available for a broader range of offences, a more limited range of offences, or are the current provisions of the YOA appropriate?**

No comment.

**Question 8: Are the current provisions governing children's entitlement to warnings appropriate?**

No comment.

**Question 9: Are the provisions governing the giving of warnings appropriate and working well in practice?**

Community Services notes that the over-representation of some refugee, migrant communities, and particularly Aboriginal and Torres Strait Islander children and young people within the Juvenile Justice system would strongly indicate that the provisions governing the giving of warnings are not working well in practice, and are not being applied fairly.

**Question 10: Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?**

Clause 12 (1) of the *Young Offenders Regulation 2010* sets out the matters which must be recorded when a child is given a warning. Unlike the matters to be recorded for a caution, the date of birth of the child is not included.

Community Services recommends that the child's date of birth be recorded. This will show their entitlement to be dealt with under the YOA.

Community Services recommends that the Police Officer must be satisfied that the correct details are provided, and if not provided by the child, then an adult must provide their own identification to verify the child's correct details.

The difficulty in practice is that not all children carry identification that provides their name, age.

Warnings cannot be recorded efficiently on COPS if sufficient identifying details are not provided. That is, if a child's name, gender, time, place and nature of offence alone (as currently prescribed in clause 12(1) of the Regulation) are recorded on the Police database numerous times and there is no link to each event and each warning. Further identifying details need to be obtained, such as date of birth and home suburb/address.

**Question 11: Are the current provisions governing the conditions for giving a caution appropriate? Are there any concerns with their operation in practice?**

Community Services notes that the over-representation of some refugee, migrant communities, and particularly Aboriginal and Torres Strait Islander children and young people within the Juvenile Justice system would strongly indicate that the provisions governing the giving of cautions are not working well in practice, and are not being applied fairly.

**Question 12: Are the provisions that govern the process of arranging and giving cautions appropriate? Are there any concerns with their operation in practice?**

No comment.

**Question 13: Are the provisions that govern the consequences of a caution appropriate? Are there any concerns with their operation in practice?**

No comment.

**Question 14:**

- (a) Are the principles that govern the conferencing still valid?**
- (b) Are any additions or changes needed?**

Community Services supports the principles that govern conferencing in section 34 of the YOA.

In relation to section 34(c)(iv) Community Services proposes that a child or young person's cultural and religious beliefs and practices also be taken into account, where appropriate.

Community Services proposes that section 34(3)(a) could be amended to provide that there is a need to deal with children in a way that reflects their rights, need and abilities and provides opportunities for development in *responsible, beneficial and socially acceptable ways*.<sup>11</sup>

Community Services recommends that section 34(3)(b) could be expanded to include that children and young persons need to be encouraged to treat others with respect and dignity.

Community Services recommends that an addition could be made to section 34(3)(e) to provide that in the determination of appropriate reparation, the outcome imposed on the

<sup>11</sup> See *Juvenile Justice Act 1992* (QLD), Sch 1, cl 8.

child or young person should be no greater than that imposed on an adult who commits an offence of the same kind.

**Question 15: Are there any concerns with the comparative rate of conference referrals from Police and the Courts? If so, how should these concerns be addressed?**

Community Services is concerned about the lower rate of referrals to conferences from Police – which is usually the first contact that a child or young person has with the criminal justice system. Community Services is also concerned that the intention of the legislators – that the majority of conference referrals would be from Police – is not being realised in practice.

Some unpublished research was conducted by Redding (2000) to compare the determinations of Police (Youth Liaison Officers) and conference administrators (CAs) on the same set of facts. Police and CAs were presented with a series of case studies and asked to state which form of intervention they would choose for each case study, with reasons for their decision. The Police tended towards higher (or more punitive) interventions than CAs. Redding states:

*‘...[the] criteria are written in terms that are hard to quantify and [the Act] uses language that is likely to be interpreted subjectively. The interpretation of the terms ‘degree of violence’ and ‘harm to victim’ are particularly prone to variations in application, reflecting the personal experiences of the referring officer and specific situational factors’.*<sup>12</sup>

Although this research was conducted over 10 years ago, it seems that the issue remains. Police are still tending towards sanctions at the other end of the continuum.

The criteria for conference eligibility outlined in the YOA are the same regardless of the referral source. However, Police may be more inclined to apply the criteria more conservatively, preferring to refer only the most obvious candidates (i.e. those with the best prospects) to a conference while continuing to direct more serious candidates to the Children’s Court.<sup>13</sup> If the Children’s Court takes a broader view of conference eligibility, one would expect court appearance rates for those referred to a conference by the Children’s Court to be higher than those referred to a conference by the Police.<sup>14</sup>

It may also be that Police are more familiar with the court process, and therefore choose that path rather than the conferencing path.

Community Services is of the view that if there was a clear schedule of offences and alternative processes developed into Standard Operating Procedures, outlining conferences as an option, it may be more likely used as an outcome by Police.

Further training of Police officers, and perhaps an information sheet about alternative processes, including conferences, could be provided to children and young persons that are being charged.

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<sup>12</sup> Redding, B, *An investigation into the Police Response to Youth Justice Conferencing in NSW Australia* (2000), unpublished Masters Thesis, Brunel University, UK, 28, cited by Clancey, G., Doran, S., Maloney, E., ‘The Operation of Warnings, Cautions and Youth Justice Conferences’, *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997*, Chan, J, editor (2005), 67.

<sup>13</sup> Vignaendra, s & Fitzgerald, J, ‘Reoffending among young people cautioned by police or who participated in a youth justice conference’, *Crime and Justice Bulletin* (No 103, October 2006), 13.

<sup>14</sup> Ibid.

Lawyers giving advice to and representing children and young person may benefit from additional training to encourage them to request a conference referral from the Court, in appropriate circumstances.

**Question 16: Are the above provisions governing conferencing appropriate? Are there any concerns with their operation in practice?**

No comment.

**Question 17: Should the YOA specify what constitutes an admission for the purposes of the YOA? If so, what form should an admission take?**

The court can refer a child to a conference in two different ways: under section 40 of the YOA, after receiving an *admission* from the child<sup>15</sup>; or after a *finding of guilt* (either a plea of guilty or a guilty finding at hearing). In the latter category, the court may make an order under section 33(1)(c1) of the CCPA releasing the child on condition that he or she complies with an outcome plan determined at a conference held under the YOA.

The difference between an admission and a plea of guilty is significant. If the court adopts the former course, this means there will be no finding of guilt and the charge must be dismissed up on completion of the outcome plan. If the court adopts the latter course, the matter will form part of the child's criminal history and for some purposes<sup>16</sup> will be regarded as a conviction.

Children who are dealt with under the YOA will usually not be liable to compensation because there is no finding of guilt by a court. If the Children's Court refers a child to a youth justice conference, it will usually do so under the provisions of the YOA, having recorded an admission rather than a plea of guilty.

It is therefore very important that children and young persons have the opportunity to obtain legal advice before making an admission or consenting to an intervention.

Community Services recommends that the YOA should be clear as to what constitutes an admission, and that an admission should include a child being in the presence of an adult he or she have elected, including but not limited, to legal counsel. The child must show an understanding of the offences he or she is alleged to have committed and that he or she is capable and of his or her own free will able to communicate that he or she committed the offence as outlined.

**Question 18: Are the provisions governing the provision of legal advice to children under the YOA appropriate? Are there any concerns with their interpretation, or operation in practice?**

Community Services supports the Young Offenders Legal Referral Protocol (YOLR), which has been in place since 2002.

Community Services proposes that it be a requirement contained in the YOA that Police are to record if the child or young person has sought legal advice prior to consequent Police action, and if legal advice is not obtained, a reason should be sought from the child

<sup>15</sup> YOA, s 40(1)(b).

<sup>16</sup>Such as an order for compensation under the *Victims Support and Rehabilitation Act 1996* (NSW), s 71.



or young person and recorded by Police. There may be circumstances where a child or young person has not been able to obtain legal advice because they did not know how, they did not have financial means to make a call, or their life circumstances prevented them from doing so (i.e. they may have been homeless). If any of these reasons exist, then the child or young person should be given more time and assistance to obtain legal advice, in circumstances similar to the YOLR.

**Question 19: Are the provisions that govern the disclosure of interventions under the YOA appropriate?**

Community Services notes that it is not a current requirement of the YOA during the cautions and conferences process that a child or young person be informed of the potential future outcome – having to disclose interventions under the YOA in applying for positions outlined in the Consultation Paper or in future proceedings before the Children’s Court. Community Services is of the view that the child or young person should be advised during the alternative processes of when a caution or youth justice conference outcome is to be disclosed in the future.

Community Services is of the view that it would seem more optimal and have more incentives for children and young persons if matters dealt with under the YOA were not matters for which they need to disclose in future employment. These offences, if they can be managed under the YOA, are perhaps not necessary to be disclosed to future employers, although should remain as appropriate for disclosure in future Children’s Court proceedings.

**Question 20:**

- (a) Is diversion still a legitimate aim of the YOA?**
- (b) If not, how could court processes and interventions be structured so as to better address re-offending amongst children?**
- (c) If so, is it still adequate and appropriate to divert children to warnings, cautions and conferences?**
- (d) What changes could be made to the interventions under the YOC, to better address re-offending amongst children and young people?**
- (e) Do the interventions under the YOA adequately cater for the needs of victims?**

Community Services is of the view that diversion is still a legitimate aim of the YOA, and is consistent with Article 37(b) of CROC which provides that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Community Services supports the diversionary hierarchical scheme of warnings, cautions and conferences.

Community Services notes, however, that a caution or conference could lead to a more significant outcome than a court order where no conviction is recorded.<sup>17</sup> Community Services recommends that consideration be given to removing cautions and conferences from the matters which must be disclosed to future employers. This would most likely have the effect of granting more incentive to children and young persons to have their matters

<sup>17</sup>*Crimes (Sentencing Procedure) Act 1999* (NSW), s 10.

managed under the YOA, and would be consistent with the aim of allowing the education and employment of the child or young person to proceed without interruption.<sup>18</sup>

Community Services is of the view that the YOA is less adequate in terms of addressing the role and rights of victims. The place of victims in the conferencing process is generally secondary to offenders. The role and place of victims in the conference process is far less regulated and more uncertain than is the case for offenders.

Community Services notes that child victims of sexual assault or other less serious sexual offences, who do not want to proceed to Court, do not have an effective avenue for the offender to be held accountable for their actions. Moreover, young persons with sexually offending behaviours are discouraged to admit their behaviours due to the criminality of it and therefore do not comfortably seek treatment support for fear of future criminal court proceedings and ramifications.

Consideration should be given in relation to incorporating less serious sexual offences or offences between same aged peers into the YOA under a schedule of offences. A warning would not be appropriate however a caution or youth justice conferencing should be available options. Training for administrators of the YOA in the sensitive area of child sexual abuse would be necessary.<sup>19</sup>

#### **Question 21:**

- (a) What changes to the YOA, or its implementation, could be made to ensure that Aboriginal and Torres Strait Islander children have equal access to diversionary interventions under the YOA?**
- (b) What changes to the YOA, or its implementation, could be made to better address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system?**

Community Services notes that the following critical factors continue to contribute to the over-representation of Aboriginal and Torres Strait Islander children and young people in the Juvenile Justice system:

- Over-policing and poor use of diversionary programs by police, or lack of access/disparate access to diversionary programs.
- Lack of crisis accommodation options, bail hostels and rehabilitation programs.
- Limited access to legal advice and in adequate resourcing of Aboriginal legal services
- Being subject to punitive outcomes in remand hearing and sentencing.
- Genuinely higher levels of offending by Aboriginal and Torres Strait Islander children and young persons

Community Services is of the view that diversionary programs must take the form of investment in education, housing, rehabilitation services, youth bail hostels, health programs, recreational, employment and training programs within a justice framework. That is, the implementation of the object and principles of the YOA must be linked to these programs.

As noted above, the objects of the Act should stress that children and young persons who have committed offences are treated fairly across NSW, and to assist in this regard, a schedule of offences should be included in the YOA which clearly sets out when a warning

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<sup>18</sup>CCPA, s 6(c).

<sup>19</sup> Queensland Department of Communities have a procedure entitled: 'Conferencing Sexual Offences', <<http://www.communities.qld.gov.au/.../conferencing-sexual-offences.doc>>.

can be used, and when it is escalated, why it is escalated to a caution, and so forth in terms of escalation to a youth justice conference.

It may be helpful to include a procedural step of consultation between a Specialist Youth Officer (SYO) and an Aboriginal Community Liaison Officer (ACLO) if determining a warning is not sufficient and that a caution will be issued in relation to an offence committed by an Aboriginal or Torres Strait Islander child or young person. The ACLO could provide authorisation for an the escalation of options. This same process should apply in terms of determining that a caution is not appropriate.

In terms of children or young persons from a CALD background, the same process of consultation and authorisation could be required with a Multicultural Liaison Officer.

It would seem protection provisions within the YOA to the “policing” and “outcomes” of Aboriginal and Torres Strait Islander children and young people may be warranted. For example, a requirement that an Aboriginal or Torres Strait Islander child or young person under the age of 14 who has committed a non-serious indictable offence will not be subject to a control order.

Other measures could include amendments to the provisions of bail i.e. a presumption in favour of bail. Police could also be required to complete and submit a form/document outlining all the efforts and reasons diversionary options were not suitable/utilised to the Court upon the commencement of criminal proceedings against an Aboriginal or Torres Strait Islander child or young person.

#### **Question 22:**

- (a) Are the interventions under the YOA adequate and appropriate for children with cognitive impairments or mental illness?**
- (b) If not, what changes could be made to better address offending by these children?**

Currently the YOA does not specifically outline any principle or object to take into consideration the child or young persons’ cognitive ability or level of mental health. Section 34(1)(c) of the YOA provides that in any measures for dealing with, or sanctions imposed on, children who are alleged to have committed offences, the age and level of development of any such children is to be taken into account. This principle only applies to the operation of youth justice conferencing.

Interventions generally do not consider mental health or cognitive impairments of children and young persons. This is particularly evident when looking at children in residential care. Police are often inappropriately used as a behaviour management tool for those in residential care, and this results in placement breakdown, inappropriate AVOs (i.e. against carers or other residents) and breaches of bail conditions. Children and young people in residential care are already subject to intensive supervision. There seems to be less tolerance to behaviour breaches or assaults against others for these children in care. Many children in these situations end up with a string of charges due to escalation, which congests the court system, only for charges to be later dismissed under section 32 of the *Mental Health Act*. Community Services is of the view that better awareness and understanding of these issues may assist.

Noting the findings of research in the Consultation Paper, children and young persons with intellectual disabilities and mental health issues are disadvantaged in the juvenile justice system. Provisions for such children focused on diversionary programs are

urgently required. Community Services is encouraged that the Law Reform Commission is reviewing criminal law and procedure as it applies to children and young people with cognitive and mental health impairments.

**Question 23: Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?**

Community Services is of the view that it is crucial to have a body with a legislative basis, that reviews the implementation of the YOA, identifies issues and recommends improvements.

The Youth Justice Advisory Committee (YJAC) had the legislative function, as per the former section 70 of the YOA, to advise the Minister and the Director-General on the following matters:

- (a) the making of regulations,
- (b) the preparation of guidelines for conferences,
- (c) the selection criteria for, appointment of and training of conference convenors,
- (d) the conduct of the review under section 76,
- (e) the performance of monitoring and evaluation of the Act, whether or not required by the Act,
- (f) any other matter relevant to the administration of Part 5 or any other provisions of the Act.

The YJAC were responsible for commissioning reviews of the Act, which have assisted in determining the effectiveness of the diversionary scheme since its inception. On 1 September 2004 the *Young Offenders Regulation 1997* was repealed resulting in the 'wrap-up' of the Committee as the website of the Department of the Attorney General and Justice states.<sup>20</sup>

The current Young Offenders Advisory Council (YOAC)'s purpose and terms of reference are as follows:

#### Purpose

- To provide independent advice to the Attorney General and Minister for Juvenile Justice on issues, policies and legislation likely to impact on the operations of the juvenile justice system and young offenders.
- To monitor and review issues, trends and research on strategies for reducing reoffending.

#### Terms of Reference

- Examine, investigate and report to Ministers on strategies for managing young offenders likely to produce a reduction in further offending.
- Evaluate the impact of existing and proposed government policy and legislation on juvenile offending within the context of the NSW State Plan priorities to reduce reoffending.
- Identify emerging issues and trends in juvenile justice and offending for consideration by Ministers.
- Advise on effective partnerships and strategies with other government agencies and communities to achieve a reduction in young offending, particularly Indigenous offenders.

The functions of the YOAC are not as broad or as authoritative as the former YJAC.

<sup>20</sup><http://www.lawlink.nsw.gov.au/yjac>.

The Juvenile Justice Advisory Council (JJAC) was established by the then Minister for Justice and Attorney General on 18 September 1991, to provide advice to the Government on juvenile justice policy and to develop a long term strategic plan for juvenile justice in New South Wales. Since that time, community representatives, services providers and experts on juvenile justice and crime prevention contributed to the advice provided by JJAC. The appointments to the JJAC were allowed to expire at the end of October 2007 and were not renewed.

It is of concern that both of these bodies disbanded despite the importance of their roles, and the current YOAC was not established until 2008.

Systematic and regular reviews of the implementation of the YOA across NSW, and having the authority to follow up recommendations by making regulations and issuing guidelines for conferencing are essential. The ‘conversational’ style of regulation, as evidenced by the role of the YJAC in monitoring and facilitating continuous improvement of the Act’s operation, is one of its key success factors.<sup>21</sup> Community Services supports the establishment of a body, with a legislative basis, charged with the responsibility of ensuring these matters take place.

Community Services would also support such a body including Aboriginal and Torres Strait Islander representatives as well as persons with expertise in the areas of disability and mental health.

Community Services notes that there is no special regulatory agency that is responsible for ensuring that Police are exercising their discretion according to the YOA.<sup>22</sup> Consideration should be given to the establishment of such an agency to ensure compliance with the YOA by the gatekeepers of the Act.

### **Children (Criminal Proceedings) Act 1987**

**Question 24: Should the age of criminal responsibility be changed? If so, why, and to what age?<sup>23</sup>**

Section 5 of the CCPA provides a conclusive presumption that a child under the age of 10 years cannot be found guilty of an offence. There is also a rebuttable presumption, at common law, that a child aged between 10 and 14 years is *doli incapax*, that is “incapable of wrong”. There appears to be no new grounds or evidence sufficient to reduce the age of criminal responsibility or to change the presumption that underpins it.

Senior Magistrate, Stephen Scarlett included a recommendation in his decision in *DPP v W* (1999, Children’s Court) that section 5 of the CCPA be amended to establish the presumption of *doli incapax* as a rebuttal principle for children over 10 and under 12. After this recommendation was made, the NSW Attorney General’s Department published a discussion paper, *A Review of the Law on the Age of Criminal Responsibility of Children*. The discussion paper outlined several proposals to reform the law in relation to *doli incapax* in NSW. One of the proposals was to incorporate the doctrine of *doli incapax* into legislation as legislative recognition of the doctrine could improve awareness of this aspect of the law and ensure that the doctrine is more consistently applied.

<sup>21</sup>Chan, J, editor, *Reshaping Juvenile Justice, The NSW Young Offenders Act 1997* (2005), The Institute of Criminology Services No 22, 196.

<sup>22</sup>ibid, at page 195.

<sup>23</sup>**Note** – the numbering in the Consultation Paper after question 23, started at 21. This submission numbers the questions chronologically.

The fact that the doctrine of *doliin capax* is located in the common law makes it less accessible and can lead to its inconsistent application. This proposal for legislative inclusion of the doctrine of *doliin capax* was also supported in the 1997 Joint Report by the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (No 84) *Seen and heard: priority for children in the legal process*.

Community Services would support a codification in the CCPA of the doctrine of *doliin capax*. Community Services notes that the Commonwealth<sup>24</sup>, the Australian Capital Territory<sup>25</sup>, the Northern Territory<sup>26</sup>, Queensland<sup>27</sup>, Tasmania<sup>28</sup>, and Western Australia<sup>29</sup> all have legislative provisions enshrining the doctrine of *doliin capax*.

**Question 25: Could the structure of the CCPA be improved? If so, what other structure is recommended?**

Community Services supports the incorporation of the YOA into the CCPA, so that criminal procedures and processes for dealing with children and young people are in one piece of legislation.

Community Services supports the suggestion that the CCPA have a sequential order or flow to it.

**Question 26:**

- (a) Are the guiding principles set out in the CCPA still valid and are any changes needed?**
- (b) Should the principles of the CCPA be the same as the principles of the YOA?**
- (c) Should the CCPA include an objects clause? If so, what should those objects be?**

Community Services supports the merging of the CCPA with the YOA, which should include merging of the principles in each Act.<sup>30</sup>

Community Services is concerned that the Courts have not been consistent in their application of the principles relevant to youth, particularly in sentencing.<sup>31</sup> Community Services would therefore support the codification of certain common law principles not currently contained in the CCPA.

In relation to the current principles in the CCPA, Community Services makes the following recommendations:

Child participation

The child participation principle, which is set out clearly in Article 12 of CROC, needs to be expanded on in the CCPA. While the CCPA refers to a child having a right to be heard and to participate in processes that lead to decisions that affect them, it should be stated that a

<sup>24</sup> Section 4N(1), *Crimes Act 1914*, Section 7.2 of the Schedule, *Criminal Code Act 1995*.

<sup>25</sup> Section 26, *Criminal Code 2002*.

<sup>26</sup> Section 38(2) of Schedule 1, *Criminal Code Act*.

<sup>27</sup> Section 29(2), *Criminal Code Act 1899*.

<sup>28</sup> Section 18(2) of Schedule 1, *Criminal Code Act 1924*.

<sup>29</sup> Section 29, *Criminal Code Act Compilation Act 1913*.

<sup>30</sup> In this regard, refer to submissions made in response to Q 3 above.

<sup>31</sup> Yehia, D, 'Youth as a mitigating factor: to what extent does the principle survive', Paper presented to the Children's Legal Service Conference on 16 June 2007, 38.

child's view will be given due weight in accordance with the age and maturity of the child. Moreover, children and young persons should be provided the opportunity to be heard either directly or through a representative.

The following Articles in CROC should also be adopted in whole or in part:

#### Article 37

- (b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*
- (c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;*
- (d) *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*

#### Other principles from common law and as recommended by the ALRC

Other principles that are found in common law, which should receive some recognition in the principles of the CCPA include:

- Considerations of punishment and general deterrence may be given less weight in favour of individual treatment aimed at rehabilitating the offender (*R v GDP* (1991) 53A Crim R 112); except when young people conduct themselves in the ways that adults do and commit a crime that involves violence or is one of considerable gravity and that the need to protect the community (*R v Tran* (1999) NSWCCA 109).
- The proximity of the offender to 18 years of age is relevant (*R v Tran* (1999) NSW CCA 109).
- The weight to be given to the element of youth does not vary according to the seriousness of the offence (*R v Hearne* [2001] 124 A Crim R 451).

The ALRC recommended in 1997, the following sentencing principles:

- the need for proportionality such that the sentence reflects the seriousness of the offence
- the importance of rehabilitating juveniles offenders
- the need to maintain and strengthen family relationships wherever possible
- the importance of the welfare, development and family relationships of the child
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juveniles offenders, especially Indigenous children.

Notably, there are no provisions in the CCPA that pay regard to the special circumstances of Aboriginal and Torres Strait Islander children, or the need to reduce their overrepresentation in the criminal justice system. Community Services would support principles in the CCPA which address these matters.

There is also little attention given to the role of parents or other primary care-givers and the family of a young offender. Strengthening the child or young person's position in the family, as well as strengthening the parents' or primary care-givers' ability to deal with offending behaviour are principles that can reduce the incidence of offending behaviours. In this regard, Article 5 of CROC states:

*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*

There should be some recognition of this principle, and the role of parents, primary care-givers and family in assisting a child or young person to refrain from offending behaviours in the CCPA. Section 7(f) and particularly section 7(g) of the YOA currently give parents and family due recognition in this respect.

#### Objects of the CCPA

Community Services would support the insertion of an objects clause into the CCPA,<sup>32</sup> and the inclusion of the following:

- To ensure that children and young persons who are alleged to have committed offences are treated fairly across NSW
- To ensure that children and young persons who are alleged to have committed criminal offences are dealt with according to the principles in the Act
- To recognise and give effect to the importance of parents, kinship groups and persons responsible for children and young persons and communities, particularly Aboriginal and Torres Strait Islander communities; and to strengthen their capacity to deal with offending by the child or young person.
- To reduce the overrepresentation of Aboriginal and Torres Strait Islander communities in the juvenile justice system<sup>33</sup>
- To address the interests and rights of victims, and to provide them with the opportunity to receive information and be involved in action taken under the Act
- To provide an effective and timely response to criminal offences alleged to have been committed by children and young persons

#### **Question 27:**

- (a) Are the processes for commencing proceedings against children appropriate?**
- (b) Is the different process for serious children's indictable offences and other serious offences appropriate?**

Community Services is of the view that the procedures documented in the *Criminal Procedures Act 1986* (NSW) in relation to Court Attendance Notices should be outlined in

<sup>32</sup> Please refer to Community Services' response to Q2 for further proposals for inclusion in the CCPA, and also in the event of the two Acts being merged.

<sup>33</sup> Community Services notes the current review of children with cognitive impairments and mental health issues and the criminal law – and would specific reference to any new object section which address their specific needs.



the CCPA to clarify when this process can be used for a child or young person, and in what situations this process is not suitable.

Of particular importance is the need to clearly establish the presumption that children should not be detained or remanded to appear at Court.<sup>34</sup>

**Question 28:**

- (a) Are the provisions of the conduct of hearings appropriate?**
- (b) Are the limitations on use of evidence of prior offences, committed as a child, appropriate?**
- (c) Should the wording of section 15 be amended to make it easier to understand?**

No comment in relation to (a) and (b).

As raised in the Consultation Paper in relation to Question 19, cautions and conferencing are to be disclosed during future Children's Court proceedings, and also during working with children checks and future employment applications (if applying for positions as Police, teachers, etc.).

Community Services supports the amendment of section 15 to provide consistency between the outcomes of the CCPA and the YOA, and to make it clear what is admissible in the Children's Court.

Community Services proposes the section 15 be amended to provide (in the following order):

- That all prior offences dealt with by a warning, caution or youth justice conference under the YOA (being in respect of when the person was a child) is admissible in Children's Court proceedings where the person is a child.<sup>35</sup>
- Other than in Children's Court proceedings, the fact that a person has been dealt with by a warning, caution or youth justice conference under the YOA (in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any subsequent criminal proceedings.
- Other than in Children's Court proceedings, the fact that a person has pleaded guilty to an offence, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) is not to be admitted into evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:
  - A conviction was not recorded against the person in respect of the first mentioned offence, or
  - The person has not been subject to any subsequent judgment, sentence or order of a court for any other offence, in the two years prior to the current offence.

**Question 29: Is it appropriate for courts other than the Children's Court, when dealing with indictable offences, to impose adult penalties or Children's Court penalties?**

<sup>34</sup> The Department of Family and Community Services has made a submission concerning children and bail in response to the review of the legislation applying to bail in NSW that Justice and Attorney General is conducting.

<sup>35</sup> This is to preclude occasions where an adult co-accused of a child is subject to Children's Court proceedings.

Community Services supports other courts having access to the penalties available to the Children's Court in limited circumstances, such as when a person commits a sexual offence as a child, but is not taken to Court in relation to that offence until they are over 21 years of age.

**Question 30: Is there any need to amend the list of factors to be taken into account when deciding whether to impose adult penalties or Children's Court penalties where they have committed a non-serious indictable offence?**

Section 18(1A) should also allow for a consideration of the child or young person's cognitive ability or susceptibility to influence by others (peer group pressure), as well as the child's mental health, if applicable.

Section 18(1A) should also provide that the Court must consider that when deciding whether the child or young person should be dealt with according to law, which exposes them to the penalties imposed on adults, that considerations of punishment and general deterrence should generally be regarded as subordinate to the need to foster rehabilitation in children and young person. While on the point of sentencing, the comments made by Allen J are relevant in this regard:

*The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well – principally although by no means only, the deterrence of others...and the rehabilitation of the offender. The community have a real interest in rehabilitation. The interest to no small extent relates to its own protection...The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, is high.<sup>36</sup>*

The importance of rehabilitating young offenders should be considered at the outset – not just at sentencing stage. It should be considered before the child or young person is exposed to the possibility of an adult sentence.

**Question 31: Does the list of special circumstances that can justify certain offenders aged 18 to 21 being placed in juvenile detention remain valid?**

Community Services supports the current provisions of section 19(4) of the CCPA.

Application of the circumstances young adults can be placed in juvenile detention needs to ensure that circumstances are reviewed regularly to ensure they remain relevant between ages 18 to 21.

**Question 32:**

- (a) What should the content of background reports be?**
- (b) Should the contents be prescribed in legislation?**
- (c) Should other reports be available to assist in sentencing?**

Community Services supports the current requirements for background reports as set out in the Regulation, and supports that the contents of such be prescribed by the Regulation. There should be some scope though for the author of the background report to include

<sup>36</sup>*R v Webster*, unreported CCA NSW (15 July 1991), per Allen J.

additional information if it is considered necessary. Currently, only the Prosecutor and the Children's Court are able to exercise discretion to include other matters required in the Report. However, other relevant issues may not be known at the time the order is made, and may only be discovered at the time of gathering information and writing the report.

Content of background reports require accountability processes that ensure a balanced professional objective assessment of the child or young person. Content should also reflect a child and young person's strengths and achievements i.e. strengths based, without belittling the responsibility of the offending behaviour.

Background reports need to relate to the child or young person's circumstances and provide the court with information as to how best to decrease the likelihood of reoffending.

Other reports if necessary should be available in sentencing. Mental health, disability, or psychologist reports may assist when determining sentencing. Reports from other currently working with the young person may also be relevant. Community Services supports an approach of the admission of all relevant evidence in relation to the child or young person's circumstances for consideration of the Court.

**Question 33: Should a Court have power to request a report from relevant government agencies in order to determine whether a young person is at risk of serious harm (and in need of care and protection) and/or whether they are homeless?**

While the criminal and care jurisdictions are separate, the Children's Court, during criminal proceedings, may become aware that a young offender is in need of care and protection. It is important that the two jurisdictions operate together in a way that ensures care and protection issues in these kinds of situations are dealt with effectively.

Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* provides for the exchange of information and co-ordination of services by agencies that have responsibilities relating to the safety, welfare or well-being of children and young persons. This Chapter provides for some of the broadest information exchange provisions of any jurisdiction. Juvenile Justice can gain what information it needs from Community Services under Chapter 16A so that a single government agency is providing reports to the Children's Court.

There is currently no guidance in CCPA or its Regulation as to how the Children's Court should respond when care issues come to the attention of the Children's Court in the course of criminal proceedings.

The only reference to the care legislation arises in section 33(3) of CCPA. That is, that in considering the range of penalties to impose on the accused child (referred to in this section as a "person"), the court will not have regard to whether the child is in need of care and protection under the care legislation. While there is a need to maintain distinction between the criminal jurisdiction and the care jurisdiction, if a child is in need of care and protection, then this may have meaning in determining the appropriate penalty. The Children's Court should be able to take into account the special circumstances of certain groups of children, particularly those who have been subject to abuse and neglect.

Community Services has considered the suggestion that the Children's Court should be given the power to make a report for child or young person to Community Services during the course of its criminal proceedings. This is the case in Victoria where the Children's Court is able to make a "referral" to the Secretary of the Department of Human Services (DHS). A 'referral' under the Victorian care system (also referred to as a notification), is

similar to a 'report' made in NSW. The Victorian *Children, Youth and Families Act 2005*, provides for the Children's Court with power to make a referral to DHS during criminal proceedings. The Court makes a referral if it considers that there is prima facie evidence that grounds exist for the making of a protection application in respect of a child who appears as a defendant in criminal proceedings.<sup>37</sup> If a matter is referred to DHS in this regard, then the matter must be investigated by DHS and a report prepared within 21 days of the referral.<sup>38</sup> The report must confirm that DHS has enquired into the matter referred and must advise whether or not a protection application will be made in respect of that child. The Children's Court may also order that the Secretary of DHS prepare a pre-sentence report, and sentencing may be deferred until such a report is provided.<sup>39</sup>

Within NSW, the following process of risk analysis and working with families usually takes place:

- a person will make a report based on reasonable grounds that the child or young person is at risk of significant harm,
- the Director-General will receive the report,
- the Director-General may investigate/make an assessment of the report,
- the Director-General will determine whether the child or young person is in need of care and protection,
- the Director-General can take a wide range of actions to promote the safety, welfare and well-being of the child or young person that does not involve court action (early intervention programs, ADR, apply casework and develop case/care plans, provide support services, engage a whole of government approach, provide temporary care),
- as a measure of last resort, the Director-General may apply for care orders in the Children's Court and provide evidence of prior alternate action.

What distinguishes the systems in Victorian and NSW systems is that Victoria has one department with both care and criminal divisions, whereas NSW has two separate departments for those divisions. Currently there is a protocol in place, which provides that when a Magistrate dealing with a child in the criminal jurisdiction of the Children's Court becomes aware of care and protection issues, the Magistrate concerned will contact Community Services through a specific arrangement, and Community Services will then proceed to follow the processes as noted above. The current protocol in place is an informal means of achieving the same outcome as the system in Victoria, albeit in a way that is suited to the care and criminal systems in NSW.

As noted above, the information exchange provisions in Chapter 16A 1998 *Children and Young Persons (Care and Protection) Act 1998* also allow for the Department of Family and Community Services to exchange information with Juvenile Justice. In preparation of background or pre-sentence reports by Juvenile Justice, Community Services is able to exchange information under these provisions to assist Juvenile Justice in its preparation of these reports.

Community Services notes that Magistrates are able to make reports under NSW child protection legislation where they suspect that a child is at risk of significant harm. However, Community Services acknowledges that there may be value in providing a clear pathway for the court to report suspicions of abuse or neglect of children, not otherwise before it, to the child protection agency in the same way that Family Court judges and federal magistrates can. Noting the provisions of the *Family Law Act 1975*. The Family Court for example has a well established process for notifying children at risk of abuse under section 67ZA. The obligation is not limited to children who are the subject of proceedings.

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<sup>37</sup>Children, Youth and Families Act 2005(Vic), s 349.

<sup>38</sup>Ibid, s 350.

<sup>39</sup>Ibid, s 355.

Community Services does not support giving the Children's Court power to require Community Services to prepare a report or report back to it within a specified time period. This would give the Children's Court an inappropriate general oversight role and would impose a costs burden on the agency with no discernible benefit for the child or young person who is the subject of the report.

Community Services notes and support the view of the Commissions in the Commonwealth Family Violence Report as follows<sup>40</sup>:

*The Commissions acknowledge the serious community concerns for many young people who traverse the child protection and juvenile justice divide. The lack of suitable accommodation and other support services, and the consequent remand in custody of increasing numbers of young people, undermines established juvenile justice principles of diversion and rehabilitation. Of particular concern are young people who are homeless as a result of family dysfunction and violence.*

*This is not an issue that is easily addressed by legislative reform alone. For example, giving children's courts formal powers to refer these matters to the child protection agency for investigation, and report, may not resolve the issue if there are no specialised bail services, refuges or other forms of suitable accommodation for young people who cannot live safely with their families. Ultimately, what is required is a commitment by state and territory governments to develop and fund adequate bail support services and bail accommodation services, in both metropolitan and regional areas, to meet identified needs.*

*Nonetheless, the Commissions consider that some legislative reform is desirable to provide a clear pathway for referral of concerns for the welfare or safety of children from the children's court to the relevant child protection agency.*

*Rather than conferring a power of referral on children's courts as proposed in the Consultation Paper, the Commissions consider that a similar outcome can be achieved by utilising existing mandatory reporting provisions in child protection legislation. However, the Commissions note that, unlike the mandatory reporting provisions applying to Family Court judges and magistrates of the Federal Magistrates Court under the Family Law Act 1975, current mandatory reporting provisions in state and territory child protection laws do not specifically refer to judicial officers and court staff. Rather, they apply generally to people who work in organisations that provide health, welfare, education, law enforcement, child care or residential services to children, thus leading to some ambiguity about whether judicial officers and court staff are mandatory reporters. To resolve any doubt, the Commissions recommend that child protection legislation be amended to provide expressly that judicial officers and court personnel are mandatory reporters and therefore have a duty to report concerns for the safety and welfare of a child or young person to the relevant child protection authority.*

**Question 34: Is the list of serious children's indictable offences appropriate? If not, what changes need to be made?**

Community Services is of the view that if the child charged with sexual offences is under 16 years of age and the only aggravating factor is the age of the victim (i.e. the victim is

<sup>40</sup> Australian Law Reform Commission, 'Family Violence, Child Protection and the Criminal Law, *Family Violence – A National Legal Response*, ALRC 114, 20.176 – 20.178.

over 10 years old and under 16 years old) then the matter should be able to be dealt with by the Children's Court and the options available under the YOA.

In these matters, Police discretion (with appropriation consultation/authorisation) could escalate the matter from warning to caution to youth conferencing to the Children's Court as appropriate.

Community Services proposes consideration of this scenario due to the current legislation regarding legal age of consent being 16 years of age, and a recognition that there is sexual activity among children and young people under 16 years of age. Currently two 15 year olds who have engaged in sexual activity with each other, if admitting to do so, are both eligible to be charged with a serious sexual offence.

Community Services would also support a similar approach in matters where the person charged is between 16 and 18 years and the victim is within 2 years age difference, and the only aggravating factor in the sexual offence is the age of a victim. These matters should be able to be managed under the YOA or the Children's Court.

In matters where it becomes known that a female under 16 years of age is pregnant, has terminated a pregnancy, or has contracted a sexually transmitted infection, if the matter could be dealt with through a caution or conferencing in appropriate circumstances, then the young pregnant female can more readily nominate the father of their child, and the matter can be finalised without the fear that the young offender would have of the matter being dealt with in Court at a later date. This would enable appropriate services to be provided, and in some circumstances, for the father to play a role in the care of the child.

These proposed changes would reflect the role of the Joint Investigative Response Teams (JIRT) across NSW and the JIRT criteria/processes that currently conflict with the legislative requirements.

**Question 35: Is the current approach to dealing with two or more co-defendants who are not all children appropriate?**

No comment.

**Question 36: Should the Children's Court hear all traffic offences allegedly committed by young people?**

The Children's Court does not have the jurisdiction to hear and determine traffic offences alleged to have been committed by a child under the YOA or the CCPA. The exception to section 28(2) of the CCPA is where the traffic offence arose in the same circumstances as another offence being dealt with by the Children's Court, or the child was not of licensable age (16 years).

Therefore for any child who is 16 years and above and has committed a traffic offence, and does not have another offence in the Children's Court arising from the same circumstances, the proceedings will be conducted in the Local Court. The Local Court is not a "closed court" and generally applies the sentencing options available to adults, although provision is made in section 210 of the *Criminal Procedure Act 1986* for the Local Court to exercise the options in the CCPA.

While the Local Court cannot impose a sentence of imprisonment on a child for a traffic offence, the Local Court could impose a period of control under section 33(1)(g) of the 1987 Act.

The Children's Court, could be given the jurisdiction to hear and determine these offences to ensure that children over 16 who have committed traffic offences and who do not meet the exception in section 28(2) of the CCPA Act, receive consistent treatment in sentencing.

Community Services would also support referring young offenders to traffic offender diversionary programs, which should be made available to offenders being sentenced in the Children's Court.

Community Services notes the operation of the U-Turn diversionary program running in Tasmania for young people aged 15-20 who have been involved in, or are at risk of becoming involved in, motor vehicle theft. U-Turn aims to reduce re-offending rates of the young people participating in the program. Students undertake a structured 10-week automotive training course in car maintenance and bodywork. Post-course support is available and past students are given the opportunity to complete their Certificate 1 in Automotive with support from the U-Turn staff.

Police and Community Youth Club (PCYC)s also run PCYC Traffic Offender Intervention Programs across NSW with the aim of reducing the likelihood of people offending or reoffending through education sessions that promote awareness of the influence of alcohol and drugs have on driving ability as well as stress, and other factors.

**Question 37: Should the CCPA clarify whether a child can be sentenced to a control order for a traffic offence?**

Community Services would support clarification of whether a child can be sentenced to a control order for traffic offences, particularly of these offences are to continue to be dealt with by the Local Court.

**Question 38:**

**(a) Are there any concerns with these provisions? In particular:**

**Is it appropriate that the Children's Court magistrates have such a discretion, rather than having the election decision rest solely with the prosecution and/or defence as is the case with the adult regime?**

**Should there be a more restricted timeframe for the defendant (or the Court) to make an election?**

**(b) Should the CCPA include any guidance about the circumstances in which the Children's Court may form the opinion that the charge may not be disposed of in a summary matter (as it does for indictable offences set out in section 18(1A)?**

No comment in relation to (a).

Community Services would support the introduction of guidance within the CCPA in relation to the circumstances that the Children's Court may form the opinion that the charge may not be disposed of summarily.

**Question 39:**

- (a) Are the penalty provisions of the CCPA appropriate?**
- (b) Are there any concerns with their operation in practice?**
- (c) Should the penalty options be clarified or simplified in the Act?**

No comment in relation to (a) and (b).

Community Services proposes that an additional penalty option be added, possibly to section 33(c2), to allow the Children's Court to specifically refer a child or young person for assessment or eligibility for a recognised sexual offenders treatment program for children or young person with sexually offending behaviours.

This option could be utilised in specific circumstances as noted by Community Services in response to Question 2.

**Question 40:**

- (a) Are the provisions for the destruction of records appropriate?**
- (b) Are there any concerns with their operation in practice?**
- (c) Should the presumption of destruction of records be reversed in relation to proceedings where a child or young person pleads guilty, or the offence is proved but the Court dismisses the charge with or without a caution?**

Community Services acknowledges that there is much onus on the courts to document and note the destruction of fingerprints etc. which would happen in the majority of cases. Given that there would be less likely as many cases requiring the request of fingerprints to be held on record, it would be more sensible that the Prosecution in those matters provide a case as to why those fingerprints etc. remain on file or record. Community Services therefore could support the reversal of the presumption in section 38 of the CCPA.

**Question 41:**

- (a) Are the provisions for the terminating and varying of good behaviour bonds and probation orders, and for dealing with breaches of such orders, appropriate?**
- (b) Are there any concerns with their operation in practice?**
- (c) Should there be a wider discretion to excuse a breach of supervised control order?**

No comment.

**Question 42: Should the YOA and the CCPA be merged? If so, what should be the objects of any new Act?**

Community Services supports a merger of the two Acts, as noted above. The merging of the two Acts has significant merit. Clear delineation, however, between diversionary and justice pathways is required.<sup>41</sup> Care also has to be taken to avoid undermining the benefits of the diversionary scheme of the YOA. It may also be appropriate to have a charter of principles included in a Schedule to the combined Act.<sup>42</sup>

<sup>41</sup> For proposals as to objects, please note Community Services response in relation to Q2 and Q26.

<sup>42</sup> The *Juvenile Justice Act 1992* (QLD) takes this approach.



Community Services looks forward to the opportunity of commenting on the proposed objects and provisions of any integrated Act.

## Other submissions

### **The over representation of children and young people in OOHC in the juvenile justice system**

Children in OOHC (those children removed from their families and placed under the parental responsibility of the Minister of Family and Community Services) are vastly over-represented in the NSW Juvenile Justice system.<sup>43</sup>

Children and young people are a particularly vulnerable group for whom the State has particular responsibility and from the limited evidence available in NSW and Australia, it is clear that OOHC experience is a substantial risk factor for juvenile justice involvement. A history of being raised outside the family unit is more prevalent among inmate populations than among the general population.<sup>44</sup> Children who have been placed in OOHC are over-represented in the juvenile justice system and have been found to experience poorer mental and physical health, particularly difficulties in accessing education, employment and housing, and having higher rates of early parenthood.<sup>45</sup> These young people suffer multiple disadvantages and are less likely to have the level of emotional, financial and social support available to most young people in their transition to adulthood.<sup>46</sup> Consequently, the long term social and economic costs to the young person and the wider community are high.<sup>47</sup>

Given the nexus between being placed in OOHC and juvenile justice involvement, the opportunity to address this significant issue should not be lost. This and other related reviews into the NSW juvenile justice system appears to be an appropriate catalyst to raise concern about how to best manage this vulnerable group of children and young persons, and to divert their involvement in the criminal justice system.

Community Services supports the findings of the Special Commission of Inquiry into Child Protection Services in NSW relating to children and young people involved in the Juvenile Justice system. In particular, any attempt to work with children and young people in the juvenile justice system requires a multi-agency approach, and that coordinated supports should be made available to the young person and their significant others at every stage of their trajectory through the system.

Community Services recommends that a multi-agency approach be taken to focus efforts on identifying measures that will reduce the numbers of children and young people in OOHC in the juvenile justice system. There is a strong correlation between child maltreatment and juvenile offending. While most victims of child abuse and neglect do not go on to offend, the proportion of juvenile offenders who have a history of reported

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<sup>43</sup> McFarlane, K, 'From Care to Custody: Young Women in Out-Of-Home Care in the Criminal Justice System', *Current Issues in Criminal Justice* (2010), 22(2), 345.

<sup>44</sup> Borzycki M, *Interventions for prisoners returning to the community* (2005). A Report prepared by the Australian Institute of Criminology for the Australian Attorney-General's Department, and Borzycki M & Baldry E 2003. Promoting integration: The provision of prisoner post-release services', *Trends & Issues in Crime & Criminal Justice*, no. 262, Australian Institute of Criminology, Canberra, ACT

<sup>45</sup> Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S., Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. *2009 NSW Young People in Custody Health Survey: Full Report* (2011) Justice Health and Juvenile Justice. Sydney, 31.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

maltreatment is high.<sup>48</sup>In the 2009 Young People in Custody Health Survey, over one-quarter (29%) of young people reported that they had been placed in OOHC before 16 years of age.<sup>49</sup>A concerted effort is required to develop effective policies that will address the causes of young people's involvement with the justice system given that little has changed in the past 20 years in respect of the over-representation of children in OOHC's involvement in the criminal justice system.<sup>50</sup>

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<sup>48</sup>Cashmore, J, 'The Link Between Child Maltreatment and Adolescent Offending Systems Neglect of Adolescents' *Family Matters* (1022, in Press), cited in: Parkinson, P, 'For Kids' Sake, Repairing the Social Environment for Australian Children and Young People (2011), Faculty of Law, University of Sydney, <[http://sydney.edu.au/law/news/docs\\_pdfs\\_images/2011/Sep/FKS-ResearchReport-Summary.pdf](http://sydney.edu.au/law/news/docs_pdfs_images/2011/Sep/FKS-ResearchReport-Summary.pdf)>, 39.

<sup>49</sup>Above n 45.

<sup>50</sup>Above n 43, 351.